5-20-2013

# Plaster v. State Appellant's Reply Brief Dckt. 40193

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| JONATHAN GEORGE PLASTER, JR., Petitioner-Appellant, vs. STATE OF IDAHO, Respondent. | ) | S.Ct. No. 40193-2012<br>District Case No. CV-2011-525 |

# REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Cassia

HONORABLE MICHAEL R. CRABTREE
Presiding Judge


Deborah Whipple ISBA# 4355
NEVIN, BENJAMIN, McKAY & BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

IDAHO ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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## II. ARGUMENT IN REPLY

Discovery was Improperly Denied and the Petition was Improperly Dismissed

Mr. Plaster set out in his Opening Brief why the district court erred in denying him discovery which thereby led to his petition being summarily dismissed in violation of his state and federal constitutional rights including his right to access to the courts, Idaho Const. Art. I, § 18, U.S. Const. Amends. 1 and 14, and his right to due process. Idaho Const. Art. I, § 13, U.S. Const. Amends. 5 and 14. Appellant's Opening Brief pages 6-11.

In response, the State has argued first that a request for all district court records and documents in a particular case is not a sufficiently specific discovery request citing *Aeschliman v. State,* 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999). The State has further argued that "it is unclear why Plaster would be entitled to information from a criminal case that was not the subject of his post-conviction petition." Respondent's Brief at page 8, referencing the district court cases CR-2005-2906 and CR-2008-249.

With regard to the State's first argument, as set out in Mr. Plaster's Opening Brief at pages 2-4 and 8-10, Mr. Plaster's request for discovery was sufficiently specific.

With regard to the State's assertion that it is unclear why Mr. Plaster would be entitled to discovery in Case No. CR-2005-2906, the record resolves any confusion. As set out in *State v. Plaster,* Docket No. 36119, unpublished opinion filed August 9, 2010 (the appeal in the underlying criminal cases), CR-2005-2906 was consolidated with CR-2008-249, and the cases remained consolidated and were resolved by a joint plea agreement. In fact, on direct appeal the issue was whether the district court erred in ruling that the State could use Mr. Plaster's admissions made during the psychosexual evaluation in Case No. CR-2005-2906 in its

prosecution of Case No. CR-2008-249.[1]

The State is precluded by the doctrine of judicial estoppel from arguing that it is unclear why the record from Case No. CR-2005-2906 is relevant to a post-conviction petition in case CR-2008-249, given that it argued (and prevailed) in the district court that the admissions obtained in the psychosexual evaluation in case No. CR-2005-2906 should be admitted in a trial in case CR-2008-249.

> Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004). The Idaho Supreme Court adopted the doctrine of judicial estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954).

*A & J Const. Co., Inc. v. Wood*, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005).

As explained by the Court of Appeals, there are very important reasons behind the doctrine of judicial estoppel:

> One purpose of the doctrine is to protect the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of judicial proceedings. The doctrine is also intended to prevent parties from playing fast and loose with the courts.

*Robertson Supply, Inc. v. Nicholls,* 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct. App. 1998) (internal citations omitted) *cited with favor in A & J Const. Co., Inc. v. Wood*, 141 Idaho at 685, 116 P.3d at 15.

The State cannot now take a position opposite to its position in the district court regarding the relevance of the records of case CR-2005-2906 to case CR-2008-249 and thus to the petition

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[1] Mr. Plaster filed a motion to augment the record and take judicial notice in this case of the Court of Appeals' decision in *State v. Plaster*, No. 36119, on May 20, 2013. In addition, a copy of the opinion is attached as an appendix to this brief.

at issue in this case.

## III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Plaster requests that the order dismissing his case be reversed and the matter remanded with instructions to grant his discovery request and allow him to make a meaningful response to the state's motion for summary dismissal.

Respectfully submitted this 20th day of May, 2013.

Deborah Whipple
Attorney for Jonathan Plaster, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on May 20, 2013, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36119

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|---|---|---|
| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>JONATHAN GEORGE PLASTER, JR.,<br><br>Defendant-Appellant. | ) | 2010 Unpublished Opinion No. 582<br><br>Filed: August 9, 2010<br><br>Stephen W. Kenyon, Clerk<br><br>THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY |

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia County. Hon. Michael R. Crabtree, District Judge.

Order granting motion in limine and judgments of conviction and sentences, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Jonathan George Plaster, Jr., appeals from his judgments of conviction entered upon conditional guilty pleas to seven counts of lewd conduct with a child under the age of sixteen, Idaho Code § 18-1508, and one count of sexual abuse of a child under the age of sixteen years, I.C. § 18-1506. We affirm.

## I.

## FACTUAL AND PROCEDURAL BACKGROUND

In September 2005, Plaster was charged with two counts of lewd conduct with a child under the age of sixteen and one count of sexual abuse of a child under the age of sixteen years. The parties reached a plea agreement and the district court agreed to be bound by it, pursuant to Idaho Criminal Rule 11. Plaster entered a conditional *Alford*[1] plea of guilty to one count of lewd

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[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).



APPENDIX 1

## II.

## ANALYSIS

Plaster's contention on appeal is as follows:

> Mindful of the fact that Mr. Plaster's participation in the psychosexual evaluation in the First Case was not required as part of the plea agreement with the State and would not factor into his sentence in any way, and mindful of the fact that Mr. Plaster moved to withdraw his plea and, thereby, knowingly withdrew from his plea agreement with the State, Mr. Plaster nevertheless contends that, because the admissions made during the psychosexual evaluation were made in reliance on the original plea agreement, it was fundamentally unfair for the district court to have ruled that the State could use those admissions against him even after the plea agreement had been vacated.

Plaster asserts only fundamental unfairness in admitting evidence of the statements made during the psychosexual evaluation. Plaster cites no Idaho precedent regarding application of fundamental fairness principles to the decision to admit or deny evidence. Aside from the statement quoted above, Plaster makes no argument as to how the admission of the evidence would be fundamentally unfair or how the district court erred in its analysis of this issue. Instead, Plaster cites, as "cf." two cases, *United States v. Ventura-Cruel*, 356 F.3d 55, 62-64 (1st Cir. 2003) and *United States v. Escamilla*, 975 F.2d 568, 571-72 (9th Cir. 1992).

In *Ventura-Cruel,* pursuant to a plea agreement, Ventura-Cruel was required to provide complete and truthful information about his crime and involvement in a drug conspiracy. In order to receive a reduction in sentence, Ventura-Cruel had to accept responsibility and provide incriminating information. The court advised him at the change of plea hearing that he was waiving his right against self-incrimination. Thereafter, Ventura-Cruel wrote a confession letter to his probation officer. Ventura-Cruel did not ask to withdraw his guilty plea, but the district court later rejected his guilty plea. The district court allowed the letter into evidence. The appellate court determined that, based upon the facts, allowing the letter into evidence would be fundamentally unfair. Ventura-Cruel had reasonably relied on the existence of the plea agreement before making his admissions. In fact, he had been advised that he had waived his right against self-incrimination and had been, by the terms of the plea agreement, required to provide incriminating information. In addition, Ventura-Cruel had not asked to have the plea withdrawn or otherwise lose the benefits of the plea agreement. Thus, under the circumstances, admitting the letter would deprive him of the benefit of the agreement, yet place the government

in a better position. *Ventura-Cruel*, 356 F.3d at 62-63. Similarly, in *Escamilla*, the defendant was required, by a plea agreement, to make incriminating statements regarding his role in a drug conspiracy and, after he made incriminating statements but failed a polygraph, the government withdrew from the agreement. Again, the court determined that using the admissions would deny him the benefit of the bargain and place the government in a superior position. *Escamilla*, 975 F.2d at 571-72.

By contrast, here, Plaster entered an *Alford* plea and was not required to and did not admit or accept responsibility for the underlying crimes charged. Plaster was advised of his rights before making the admissions. There were no provisions in the plea agreement which induced Plaster to make incriminating statements. Plaster, not the State, voluntarily withdrew from the plea agreement. Further, the district court determined that the statements were voluntarily made. Plaster has failed to demonstrate or provide relevant authority for his claim that admission of the evidence was erroneous on the ground that such admission would be fundamentally unfair.

## III.

## CONCLUSION

Plaster has not demonstrated error in admitting into evidence the statements made in the psychosexual evaluation. Therefore, the district court's order granting the State's motion in limine, and Plaster's judgments of conviction and sentences are affirmed.

Judge GUTIERREZ and Judge MELANSON, **CONCUR.**